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In The

Supreme Court of the United States

October Term, 1979

No. **79-1756**

KEENAN MOTORS, INC.,

Petitioner,

vs.

A.R.D. CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

Supreme Court of the United States

October Term, 1979

No.

KEENAN MOTORS, INC.,

Petitioner,

vs.

A.R.D. CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Keenan Motors, Inc. respectfully prays that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 17, 1980 and on which a rehearing in banc was denied by order of the said court (two of the said judges having voted to grant a rehearing) on April 9, 1980.

OPINION BELOW

There was no formal opinion of the court of appeals. Its judgment order affirming the judgment of the United States District Court is reproduced in the appendix and has not yet been reported. The opinions of the district court, which have not been reported, are reproduced in the appendix.

JURISDICTION

The judgment order of the court of appeals was entered on March 17, 1980. A petition for rehearing, timely filed, was denied on April 9, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, in a claim under 15 U.S.C. §1989, for knowingly and with intent to defraud, selling an automobile which had more miles on it than shown on its odometer, the court of appeals erred in affirming the trial judge's instruction to the jury that the intent to defraud under 15 U.S.C. §1989 need be established only by a preponderance of the evidence as opposed to a higher standard of civil proof.

2. Whether the court of appeals, in a claim for compensatory and punitive damages under Pennsylvania law, erred in disregarding Pennsylvania law in affirming an award of $50,000 in punitive damages where the jury found compensatory damages of only $5,200 and Pennsylvania law requires that punitive damages be proportionate to and reasonably related to the compensatory damages.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. §1988 provides in pertinent part:

> "(a) Not later than 90 days after October 20, 1972, the Secretary [of Transportation] shall prescribe rules requiring any transferor to give the following written disclosure to the transferee in connection with the transfer of ownership of the motor vehicle:
>
> (1) Disclosure of the cumulative mileage registered on the odometer.

> (2) Disclosure that the actual mileage is unknown, if the odometer reading is known to the transferor to be different from the number of miles the vehicle has actually travelled.
>
> . . . (b) No transferor shall violate any rule prescribed under this section or give a full statement to a transferee in making any disclosure required by such rules."

15 U.S.C. §1989 provides in pertinent part:

> "(a) Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of — (1) three times the amount of actual damages sustained or $1,500, whichever is greater. . . ."

STATEMENT OF THE CASE

This suit, instituted in the United States District Court for the Eastern District of Pennsylvania, arises out of the sale of a used 1969 Rolls Royce automobile (herein automobile) by petitioner Keenan Motors, Inc., an authorized Rolls Royce dealer to A.R.D. Corporation (herein plaintiff) for $19,000 in March of 1977 and basically involves two separate causes of action. One cause of action is a claim under Section 1989 of the Motor Vehicle and Cost Savings Act, 15 U.S.C. §1989 which in essence imposes liability on a transferor of an automobile, who, with intent to defraud, knowingly transfers an automobile which had travelled more miles than indicated on its odometer without revealing the same to the transferee. The other cause of action is a claim under Pennsylvania law for compensatory damages and punitive damages for negligence in connection with the repair of the automobile.

Plaintiff in its complaint alleged the automobile had travelled more miles than indicated on its odometer and petitioner knowingly and with intent to defraud sold the automobile to it without revealing the alleged discrepancy in mileage in violation of 15 U.S.C. §1989. Plaintiff further alleged that petitioner failed to make certain repairs and was negligent in making other repairs to the automobile.

Petitioner denied all of the charges made in the complaint.

The case was tried before District Court Judge Clarence C. Newcomer and a jury.

At the trial petitioner denied that the automobile had travelled more miles than indicated on its odometer, and relied on the testimony of the prior owner's husband — a retired, wealthy executive, the wife owner having died prior to trial, who testified that neither he nor his wife ever tampered with the odometer and that the mileage was consistent with his wife's driving habits, his wife having purchased the automobile new from petitioner some years earlier. Plaintiff produced no actual evidence that the automobile had in fact travelled more miles than indicated on its odometer, but relied solely on opinion evidence of four persons none of whom examined the automobile until more than three months after the date plaintiff purchased the automobile from petitioner and after plaintiff had driven the automobile some 8,000 miles.

With respect to the negligence count, plaintiff contended that one of petitioner's employees disconnected a wire leading to the brake warning lights, but this was denied by the employee in question. There was disputed testimony as to the other repairs.

The jury found against petitioner on all counts and awarded plaintiff $4,500 on the count under 15 U.S.C. §1989 which was trebled by the court to $13,500, and awarded plaintiff $5,200 in compensatory damages representing repairs and substitute

transportation caused by petitioner's negligence and awarded plaintiff $125,000 in punitive damages on the negligence count.

The trial judge denied petitioner's post trial motions for judgment notwithstanding the verdict and for a new trial, but reduced the award of punitive damages $50,000. The trial judge awarded plaintiff counsel fees of $9,920 under 15 U.S.C. §1989 and entered a judgment in the total sum of $79,620 against petitioner.

The court of appeals by judgment order entered March 17, 1980 affirmed the judgment entered by the trial judge without opinion.

Petitioner filed a petition for rehearing before the court of appeals in banc, which petition was denied by the court of appeals with two judges of the court of appeals voting in favor of rehearing.

BASIS FOR FEDERAL JURISDICATION OF THE DISTRICT COURT

Jurisdiction of the district court with respect to the claim under 15 U.S.C. §1989 was based on 15 U.S.C. §1989(b) and jurisdiction with respect to the claim for negligence under Pennsylvania law was based on diversity of citizenship in accordance with 28 U.S.C. §1332.

REASONS FOR GRANTING THE WRIT

I.

The trial judge's instruction to the jury as to the burden of proof required to establish intent to defraud under a federal statute, affirmed by the court of appeals, was contrary to the standard of proof required in the federal courts to establish civil fraud.

In this case the issue as to whether the automobile had in fact travelled more miles than indicated on its odometer was vigorously contested by petitioner. In fact, petitioner's evidence apparently persuaded the trial judge that the vehicle in fact did not travel more miles than indicated on its odometer because the trial judge in his memorandum opinion accompanying his order awarding plaintiff counsel fees wrote:

> "Considering the testimony of the prior owners of the car presented by the defendant, the Court frankly might not have arrived at the same conclusion that the jury did, i.e., that the car had traveled more miles than were reflected on its odometer at the time it was sold to the plaintiff." (R780a).

In submitting this issue to the jury, the trial judge charged that "A.R.D. alleges that Kennan Motors knew the odometer was incorrect and sold the car to A.R.D. with an intent to defraud. This claim must be proved by a preponderance of the evidence . . ." (R725a).

The objection made by petitioner's counsel that intent to defraud had to be established by a higher civil standard (R739a, 740a) was denied by the trial judge.

In *Woodby v. Immigration and Naturalization Service,* 385 U.S. 276, 285, 87 S. Ct. 483, 488 (1976) the Court stated:

> "In denaturalization cases the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence. The same burden has been imposed in expatriation cases. That standard of proof is no stranger to the civil law."

And in a footnote to that last sentence the Court wrote:

> "This standard, or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud . . ."

More recently, in *Addington v. Texas,* 99 S. Ct. 1804, 1808 (1979) Chief Justice Burger discussing the different standards of civil proof stated:

> "Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion. In criminal cases, on the other hand the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of erroneous judgment . . . The intermediate standard, which usually employs some combination of the words 'clear', 'cogent', 'unequivocal' and 'convincing', is less commonly used, but none the less 'is no stranger to the civil

> law' *Woodby vs. INS,* 385 U.S. 276, 285, 87 S. Ct. 483, 488, 17 L.Ed. 2nd 362 (1967). See also McCormick Evidence Sec. 320 (1954); 9 Wigmore, Evidence Sec. 2498, 3rd Ed. (1940). One typical use of the standard is in civil cases involving allegations of fraud or some other quasi criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used 'clear, unequivocal and convincing' standard of proof to protect particularly important interests in various civil cases."

In *Collins Securities Corporation v. S.E.C.,* 562 F. 2d 820, 824 (C.A.D.C. 1977), the court in reversing a decision by the Securities and Exchange Commission that a certain broker dealer violated the anti-fraud provisions of the Security Law because that decision was based on a preponderance of the evidence standard of proof, stated: "There are literally hundreds of cases decided by the United States courts of appeals in which the standard applied in civil fraud situations has been 'clear and convincing evidence'."

The Third Circuit itself in prior cases imposed the higher standard of proof where the charge was civil fraud.

In *Eastern Express, Inc. v. Mack Warehouse Corporation,* 326 F. 2d 554 (3rd Cir. 1964) the court said at page 566:

> "Moreover, since this is a fraud case, the trial court could find for the plaintiff buyer only if the proof of fraudulent misrepresentation was clear and convincing. A mere preponderance of

> evidence in favor of plaintiff's factual contention would not suffice."

In *Proctor v. Sagamore Big Game Club*, 265 F.2d 196 (3rd Cir. 1959) the court stated at page 202:

> "Fraud can be proven only by evidence which is clear, explicit and unequivocal."

In *Ratay v. The Lincoln National Life Insurance Company*, 378 F. 2d 209 (3rd Cir. 1967) the trial court was reversed and a new trial ordered where the jury was instructed that the burden in proving the elements of fraud was by a "fair preponderance of the credible evidence", the court at page 212 said that the party who alleges fraud:

> ". . must prove the facts on which his allegation rests by evidence that is 'clear, precise and indubitable.' "

The charge of civil fraud against petitioner in the instant case involved more than a mere matter of money. It seriously impugned and tarnished the reputation of an automobile dealer with an impeccable record.

As the trial judge's charge on the standard of proof in the instant case, affirmed by the court of appeals, was so clearly contrary to the long established federal rule, the grant of certiorari to review the judgment below is justified.

II.

The decision below affirming the award of $50,000 in punitive damages where only $5,200 in compensatory damages was awarded, seriously conflicts with the long established applicable Pennsylvania law.

The jury awarded plaintiff $5,200 in compensatory damages on the negligence count, which consisted of costs of repair and substitute transportation. There were no personal injuries involved nor was the automobile involved in any collision. The Pennsylvania law with respect to the measure of punitive damages is well summarized in a lower court opinion in *Hannigan v. S. Klein's Department Store,* 1 D. & C. 3rd 339 (Phil. Ct. Comm. Pleas, 1976), which opinion was affirmed per curium by the Pennsylvania Superior Court in *Hannigan v. S. Klein's Department Store,* 371 A.2d 872 (Pa. Super. 1976). In that case the lower court stated at pages 353-354:

> "There is no set formula for setting punitive damages. An upper limit was indicated in *Voltz v. General Motors Acceptance Corp.*, 332 Pa. 141, 2 A.2d 697 (1938), where punitive damages almost treble the actual damages were held to be excessive. On the other hand in *Certified Laboratories of Texas, Inc. v. Rubinson,* 303 F. Supp. 1014 (E.D. Pa. 1969), the federal court, applying Pennsylvania law, awarded damages double the compensatory damages, and in *Arye v. Dickstein,* 337 Pa. 471, 12 A.2d 19 (1940), the Pennsylvania Supreme Court reduced an award for punitive damages to an amount equal to compensatory damages. . . .See, e.g., *Hughes v. Babcock,* 349 Pa. 475, 37 A. 2d 551 (1944); *Rider v. York Haven Water & Power Co.,* 251 Pa. 18, 95 Atl. 803 (1915), after retrial, 255 Pa. 196 (1916); *Esmond v. Liscio,* 209 Pa. Superior Ct.

200, 224 A. 2d 793 (1966); *Murphy v. Cleland Simpson Co., Inc.*, 68 Lack. 58 (1967).

> Therefore, although we found that the amount of the award for punitive damages was not improper as a matter of law, we felt that an award in an amount half the compensatory damages was more in conformance with Pennsylvania case law. Accordingly, we ordered the punitive damages reduced from $52,500. to $17,500."

In *Voltz v. General Motors*, 332 Pa. 141, 144, 145 (1938), cited in the above opinion, the Supreme Court of Pennsylvania although not questioning the lower court's characterization of the defendant's conduct as "outrageous and high-handed", reduced an award of punitive damages from $2,500 to $1,000 where the actual damages amounted to $859.73.

In *Hughes v. Babcock*, 349 Pa. 475, 37 A. 2d 551 (1954) also cited in the above opinion, the jury returned a verdict for plaintiff in the sum of $2,500 for compensatory damages and $5,000 in punitive damages and the lower court ordered a remittitur of $2,000 of the punitive damages. The Supreme Court further reduced punitive damages from $3,000 to $1,000. The Supreme Court after concluding the evidence was certainly sufficient to permit a finding of punitive damages said at pages 480, 481:

> "We believe . . . that the verdict for punitive damages, even as remitted to $3000.00 is excessive. Although there is no fixed rule governing the amount which should be awarded as exemplary damages, it must not be disproportionate to the award of compensatory damages."

The most recent appellate pronouncement with respect to the allowable amount of punitive damages was made by the

Pennsylvania Superior Court in *Golomb v. Korus,* 396 A. 2d 430, 431 (1978) where the Court in citing *Hughes v. Babcock, supra,* and earlier Pennsylvania Supreme Court cases stated:

> "Punitive damages may not be disproportionate to the compensatory damages."

In the instant case the trial judge in his opinion allowing $50,000 in punitive damages acknowledged that the award of $50,000 in punitive damages where the compensatory damages awarded were only $5,200 was, "so far as the Court has been able to determine, proportionately larger, in relation to the actual damages, than any award that has been approved in any reported decision construing Pennsylvania law."

It is clear from the examination of the Pennsylvania authorities that no Pennsylvania court would have approved the award of punitive damages of $50,000 where compensatory damages were only $5,200.

The clear disregard of the Pennsylvania law with respect to the amount of punitive damages by the court of appeals in affirming the award of punitive damages in the instant case was such a clear disregard of Pennsylvania law and the decisions of the United States Supreme Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and its progeny that the grant of certiorari to review the judgment below is justified.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the court of appeals in the instant case.

Respectfully submitted,

s/ Benjamin R. Jones
Dilworth, Paxson, Kalish
& Levy

s/ Milton S. Lazaroff
Techner, Rubin, Shapiro,
Slass & Lazaroff
Attorneys for Petitioner

APPENDIX

PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1751 & 79-2108

A.R.D. CORPORATION

vs.

KEENAN MOTORS, INC.,

Appellant

(E.D. Pa. Civil No. 77-4143)

Present:

SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and SLOVITER, *Circuit Judges,** and Gerry, *District* Judge.**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

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* Judge Higginbotham did not participate in the consideration of this matter.

** Honorable John F. Gerry, of the United States District Court for the District of New Jersey, sitting by designation.

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Aldisert
Judge

Dated: April 9, 1980

Judges Adams and Rosenn would grant rehearing.

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 17, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1751 and 79-2108

A.R.D. CORPORATION

vs.

KEENAN MOTORS, INC.,

Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania

(D.C. Civil No. 77-4143)

Submitted Under Third Circuit Rule 12(6)

March 17, 1980

Before: ALDISERT and GIBBONS, *Circuit Judges,* and GERRY, *District Judge.**

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

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* Honorable John F. Gerry, of the United States District Court for the District of New Jersey, sitting by designation.

Judgment

Costs taxed against appellant.

BY THE COURT,

s/ Aldisert

Circuit Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: Mar 17, 1980

MEMORANDUM AND ORDER (FILED APRIL 5, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.R.D. CORPORATION

vs.

KEENAN MOTORS, INC.

CIVIL ACTION

NO. 77-4143

Newcomer, J. April 4, 1979.

The defendant has moved for judgment notwithstanding the verdict, or in the alternative for a new trial. Most of the defendant's arguments do not require discussion, and the defendant's motion will be denied, but the Court finds that it will be required to amend the judgment in certain respects.

The defendant first argues that the verdict on the odometer count of the complaint must be overturned. The Court may not have come to the same conclusion that the jury did on the issue, but reasonable minds could certainly differ as to whether the plaintiff had proved its case. Abundant evidence supports the jury's verdict. Judgment n.o.v. is therefore not warranted.

The Court charged the proper standard of proof on the odometer count. "Fraud" was not in issue; "intent to defraud" was. The defendant did not point to any case which has applied a higher than normal standard of proof in an action under 15 U.S.C. §1989, and the Court cannot infer that Congress intended that a higher burden of proof should be placed on such actions. In the absence of any contrary authority, the Court

must apply the usual civil standard of proof, i.e. proof by a preponderance of the evidence.

The defendant argues that the Court should have granted a mistrial when the plaintiff's counsel mentioned the amount sought in the *ad damnum* clause of the complaint. The Court carefully and repeatedly instructed the jury to disregard the remark and the Court is confident that the jury was able to do so. Refusal to declare a mistrial was not error. *Garrett v. Faust,* 183 F.2d 625 (3d Cir. 1950); *Bowers v. Pennsylvania R.R. Co.,* 281 F.2d 953 (3d Cir. 1960); 58 Am Jur 2nd, *New Trial,* §56, n.12.

The defendant argues that the jury should have been charged in accordance with Restatement of Torts, Section 909, as to the facts that must be found before an employer may be held liable for punitive damages for the acts of its employees.

The defendant is incorrect in its reading of the law. A corporation may be held liable for punitive damages for the act of its servant acting within the scope of his authority. *Chuy v. The Philadelphia Eagles Football Club,* Nos. 77-1411 and 77-1412, (3d Cir., March 9, 1979) (Slip Opin. at 20); *Skeels v. Universal CIT Credit Corp.,* 335 F.2d 846 (3d Cir. 1964). All the acts proved in this case were clearly within the scope of such authority.

In any event, the Court's refusal to charge on the point was not objected to with sufficient specificity for the Court to be properly apprised of the claimed error. Rule 51, F.R.Civ.P.

One of the defendant's objections to the verdict is meritorious. The jury returned a verdict of $125,000. for punitive damages for gross negligence, despite having awarded but $5,200 in actual damages for negligence. The Court charged the jury

that an award of punitive damages must be reasonably related to any actual damages awarded. (n.T. 4-225). *Hughes v. Babcock*, 349 Pa. 475 (1944).

The Court has found no Pennsylvania case which has approved punitive damages in an amount approaching twenty-five times the actual damages sustained. Admittedly, a multiplier is not the best indicator of the propriety of the verdict, notwithstanding some early cases that implied that it is. Cf. *Thompson v. Swank*, 317 Pa. 158 (1934). Each case involves unique facts, and ideally, "the jury fixes the amount of such damages (which are in no sense compensatory but purely penal in nature) without yardstick, subject only to reduction by the court if deemed excessive under the circumstances of the particular case." *International Electronics Co. v. N.S.T. Metal Products Co., Inc.*, 370 Pa. 213, 225 (1952). Nevertheless, as a matter of law, the punitive damages awarded here were excessive and not "reasonably related" to the actual damages.

This Court adopts the approach to this issue set forth in Judge Fullam's learned opinion in *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163 (E.D. Pa. 1971), *rev'd on other grounds*, 476 F.2d 471 (1973):

> "[I]t is my view that the concept of reasonable relationship between a punitive award should vary, depending upon (a) the egregiousness of the defendant's wrongful conduct and (b) the relative generosity of the compensatory award." 329 F. Supp. at 1170.

In this case the plaintiff's evidence, if believed, established a wreckless, life-threatening indifference on the part of the defendant to the safety of Mr. Dervaes and his passengers. The jury could properly have found that the conduct was egregious.

Memorandum and Order (Filed April 5, 1979)

In *Chuy v. Philadelphia Eagles Football Club,* 431 F. Supp. 254 (E.D. Pa. 1977), aff'd, Nos. 77-1411 and 77-1412 (3d Cir., March 9, 1979), Judge Becker approved an award of $60,590.96 in punitive damages above an award of $10,000 in actual damages. There, the defendant's staff doctor made statements to the press to the effect that the plaintiff had a fatal disease which, in fact, he did not have. Judge Becker found that "the size of the award permissibly reflects a concern that the kind of conduct found to have taken place requires a punishment which will chill the recurrence of similar conduct." 431 F. Supp. at 271.

The conduct detailed in *Chuy, supra.*, was egregious, but not life-threatening. The conduct in this case justifies an award proportionately larger than the amount approved there (although the absence of actual personal injury to Mr. Dervaes holds down the figure somewhat). The Court finds that, on an award of compensatory damages of $5200 for negligence (which the Court believes to have been approximately accurate), the jury might properly have awarded "reasonably related" punitive damages in the sum of $50,000.

Obviously, the standard for determining what punitive damages are "excessive" is no more precise than the standard for determining what punitive damages are proper in the first place. However, the "reasonably related" limitation is a legal constraint that cannot be ignored. The jury's verdict was properly in accord with all of the factors that must be considered in awarding punitive damages, except that the award was not reasonably related to the actual damages.

The Court heard the same evidence of the defendant's misconduct that the jury heard. The most likely explanation for the discrepancy between the Court's conclusion and the jury's is that the Court considers itself constrained by the "reasonably related" standard — it does not appear, realistically, that the jury accorded that standard much, if any, consideration.

Memorandum and Order (Filed April 5, 1979)

The amount of punitive damages that the Court considers appropriate is, so far as the Court has been able to determine, proportionately larger, in relation to the actual damages, than any award that has been approved in any reported decision construing Pennsylvania law. Considering the egregiousness of the defendant's conduct and the deterrent purposes of punitive damages, an award of punitive damages in the amount of $50,000 is reasonably related to the actual damages. However, $50,000 is the maximum amount that a reasonable juror could have found to have been reasonably related to the actual damages found in this case.

The Court will not order a remittitur of the excess damages with a new trial as an alternative. A remittitur is proper only where the jury's award is directly and seriously contrary to the facts. The Court finds that the compensatory award was reasonable; only the punitive award was excessive. In the Court's opinion, a second jury, on these facts, could return a maximum amount, as a matter of law, of $50,000 in punitive damages for gross negligence. Where only the question of "reasonable relationship" between the two awards is at issue, a court may reduce the punitive award without ordering a new trial as an alternative. *Hughes v. Babcock, supra.*, 349 Pa. at 481.

The plaintiff is entitled to costs and attorney's fees for the prosecution of this action. 15 U.S.C. §1989(a)(2). By separate Order the Court will schedule a hearing on the question of the proper amount of attorney's fees to be awarded in this case, and the judgment will be amended thereafter accordingly. See, generally, *Lindy Brothers, Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), *following* remand, 540 F.2d 102 (3d Cir. 1976).

Costs will be taxed against the defendant by the Clerk of Court. The plaintiff shall file a bill of costs which the Clerk will first consider and then allow in whole or in part. Rule 38, Local

Memorandum and Order (Filed April 5, 1979)

Rules of Civil Procedure. After the conclusion of the hearing on attorney's fees the judgment will be formally amended to reflect the reduction in the award of punitive damages, and the addition of attorney's fees and costs.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.R.D. CORPORATION

V.

KEENAN MOTORS, INC.

CIVIL ACTION

NO. 77-4143

ORDER

AND NOW, to wit, this 4th day of April, 1979, upon consideration of the defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, it is hereby Ordered that the motion is DENIED.

The judgment will be amended at a later time to reflect an award of attorney's fees and costs, and, in accordance with the accompanying Memorandum, a reduction in the award of punitive damages to the amount of fifty thousand dollars ($50,000).

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

MEMORANDUM AND ORDER (FILED JULY 3, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.R.D. CORPORATION

V.

KEENAN MOTORS, INC.

CIVIL ACTION

NO. 77-4143

Newcomer, J July 2, 1979

Upon consideration of the plaintiff's motion for attorneys' fees, the Court makes the following findings:

1. The plaintiff was the prevailing party in an action brought under 15 U.S.C. §1981, *et. seq.*, which prohibits sale of a motor vehicle with an odometer known to be incorrect, unless that fact is revealed to the buyer. 15 U.S.C. §1989(a)(2) provides for the award of reasonable attorneys' fees to a plaintiff who establishes the defendant's liability under the statute. In this case a jury awarded the plaintiff a verdict of $4,500 which was trebled by the Court pursuant to 15 U.S.C. §1989(a)(1).

2. To arrive at the reasonable fee award for the services of the plaintiff's attorney in prosecuting its odometer claim, the Court must find the reasonable hourly rate for the attorney's services and multiply it by the number of compensable hours expended by the attorney. After this "lodestar" amount is found, the Court can increase or decrease it to reflect the contingent nature of success and the quality of the attorney's work in the case. *Lindy Bros. Builders, Inc. of Philadelphia v. American*

Radiator and Standard Sanitary Corp., 487 F. 2d 161 (3d Cir. 1973) (*Lindy I*); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp.*, 540 F. 2d 102 (3d Cir. 1976) (*Lindy II*).

3. This case is complicated somewhat by the presence of additional claims (i.e. Fraud and Negligence), upon which the plaintiff also prevailed at trial. Plaintiff's counsel's records of time worked understandably do not distinguish between time spent on the odometer claims and time spent on the plaintiff's other claims. The Court held a hearing to determine what amount of time was actually spent on the odometer portion of the case, which was compensable under 15 U.S.C. §1989.

4. The Court finds that plaintiff's counsel spent approximately 50% of his total billable time on the odometer portion of the case. The odometer issues were easily the most complex issues of the case, both legally and factually. The Court believes that more than half of the evidence adduced at trial related to the odometer claim, and it is apparent from counsel's affidavit in support of the motion for attorneys' fees that approximately half of his preparation time was spent on odometer-related issues. The defendant was unable to rebut that showing at hearing, and the Court finds plaintiff's counsel's affidavit to be entirely credible.

5. Plaintiff's counsel's affidavit is also entirely credible and unrebutted as to the total amount of time spent on the case. Counsel maintained a careful, professional log of his activities during the case. A review of the affidavit shows nothing out of the ordinary or excessive. The log shows that plaintiff's counsel spent 369 1/2 hours in out-of-court time, and 21 hours of in-court time. Counsel's billing rates are $70 per hour for out-of-court work, and $100 per hour for in-court work.

6. Plaintiff's counsel, Mr. Owens, has been practicing law for 8 years, approximately 4 of which have been spent as a

litigation specialist. The Court believes that counsel's billing rate is commensurate with the normal billing rate for attorneys of his experience and ability in the area, and finds those rates to be reasonable. Hence, the "lodestar" can be calculated by multiplying out-of-court billing rate and multiplying again by .5 (reflecting the amount of time spent on odometer issues). Similarly, the in-court-time must be multiplied by the in-court billing rate, and again by 50%, which is approximately the amount of in-court time devoted to odometer issues, when opening and closing statements, all arguments of counsel, and presentation of evidence is considered together. The Court calculates the "lodestar" amount as $13,982.50.

7. Before finally determining the actual fee to be awarded, two other factors must be considered: the quality of the attorney's work and the contingent nature of success. *Lindy I, supra.* In this case, the quality of counsel's work was excellent, and the obstacles against his establishing the odometer claim were formidable. Considering the testimony of the prior owners of the car presented by the defendant, the Court frankly might not have arrived at the same conclusion that the jury did, i.e. that the car had travelled more miles than were reflected on its odometer at the time it was sold to the plaintiff. Plaintiff's counsel did a good job of marshalling his proof and carrying his burden of pursuasion, and his use of witnesses who were experts on the subject of automobile wear patterns obviously required a significant investment of counsel's time. Nevertheless, the Court will not therefore increase the "lodestar" amount, for two reasons. First, it is not at all clear whether the contingent nature of success should be given extensive consideration where the statute contemplates awarding attorneys' fees only where the plaintiff has already prevailed, eliminating any contingency. Secondly, the Court must admit (as does plaintiff's counsel) that its conclusion that counsel spent 50% of his time on odometer issues is at best an approximation.

Memorandum and Order (Filed July 3, 1979)

8. Although the Court believes that plaintiff's counsel rendered highly professional service, the "lodestar" amount must be reduced somewhat on another basis. *Lindy I* "permits the court . . . to reduce the objectively determined fee where the benefit produced does not warrant awarding the full value of the time expended." *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 168-9 (3d Cir. 1975). Here, the plaintiff gained a verdict of $4,500 on his odometer count which was trebled, pursuant to statute, to $13,500. To award attorney's fees in an amount exceeding actual damages, trebled, would be to penalize the defendant to an extent not contemplated by Congress. On the other hand, it would be a rare case in which the actual amount of loss attributable to odometer fraud exceded the cost of pursuing the claim through trial, a fact of which Congress must have been aware. The Court must strike a balance which avoids unduly punishing the defendant, while avoiding penalizing plaintiff's counsel for the careful and thorough manner in which he prepared his case. The Court believes that a fee award of $9500 (slightly more than two-thirds of the "lodestar") is high enough to encourage the bringing of similar claims, yet low enough to avoid unnecessarily penalizing the defendant. The sum of $9500 amounts to "reasonable attorney fees" (15 U.S.C. §1989(a)(2) under all the circumstances of the case.

9. Plaintiff is also entitled to an award compensating it for the attorneys' fee of local counsel, Astor and Weiss. See Local Rule of Civil Procedure 10. Astor and Weiss billed the plaintiff for $840.00 for services rendered. That amount must be adjusted by the 50% figure discussed above, to the amount of $420.00. The Court finds that $420.00 is a reasonable amount for services rendered by local counsel with respect to the odometer issues.

10. The plaintiff shall be awarded attorneys' fees in the amount of $9,920.00.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

Memorandum and Order (Filed July 3, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.R.D. CORPORATION

V.

KEENAN MOTORS, INC.

CIVIL ACTION

NO. 77-4143

ORDER

AND NOW, to wit, this 2nd day of July, 1979, upon consideration of the plaintiff's Motion for the Award of Attorneys' Fees, and in accordance with the accompanying memorandum, it is hereby Ordered that the plaintiff is entitled to attorneys' fees in the amount of $9,920.00.

It is further Ordered that the plaintiff's various post-trial motions relating to discovery with respect to execution of judgment are DENIED; and the Court's Order staying the transfer of the record on appeal is hereby dissolved.

An amended final judgment is hereby entered in favor of the plaintiff and against the defendant in the amount of $79,626.00, plus costs as determined by the Clerk of Court.

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.